Yew Chye Heng & Anor v Venice Hill Resort Living Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING UP NO D8–28–286 OF 2006
KANG HWEE GEE J
8 AUGUST 2007

Companies and Corporations — Winding up — Petition under s 218 — Application to wind up developer — 250 purchasers cum creditors but only six opposing creditors had given due notice to appear in the hearing — Whether other purchasers could be treated as opposers — Whether winding up order would affect their interest — Discretion of court — Where balance of convenience lies

The petitioner filed a petition to wind up the respondent company on account of the fact that it was unable to pay its debt pursuant to the issuance of a statutory notice under s 218 of the Companies Act 1965. The application was opposed by the respondent mainly on the ground that there were other creditors and purchasers to the units being developed by the respondent. There were 250 purchasers cum creditors who had purchased the entire Tower 9 and the developer respondent was now in the final process of obtaining CF to hand over effective possession to the 250 purchasers. A winding-up order will cause untold problems to the owners who had been waiting to get the property for the past 10 years. There were only six opposing creditors who had given due notice to appear in this hearing. The petitioners submitted that numerically the majority of creditors in Tower 9 supported the winding up petition by virtue of the inability of the respondent to secure their signatories. The six opposing creditors did not form the majority of creditors opposing the winding-up petition. They constituted but six of about 250 other purchasers of Tower 9. Unless they were present, they could not be treated as opposers. On the issue of CF, the respondent company had already submitted an application for CF to the authorities. The respondent was not required to do anything more. The winding up order would not affect their interest. The petitioners on the other hand had rescinded the sale and purchase agreement of two units and had successfully sued and obtained judgment against the respondent. Hence the units had reverted back to the respondent company.

Held, granting winding up order:

(1) The question of whether a company is able to pay its debt is to be judged on whether it is commercially solvent and not whether it has assets locked up sufficient to meet its current liabilities. The submission of counsel for the respondent that his client had ample assets to meet its liabilities was untenable for it was clear until today the respondent was unable to pay its debt and was therefore liable to be wound up (see paras 14 & 16).

(2) Nevertheless, s 221 of the Companies Act 1965 gives the court the discretion whether or not to wind up a company where there are creditors who opposed the petition. In the instant petition there were six unsecured creditors who opposed the petition. Their only interest in the company was the obligation of the company to complete the sale of their respective units of condominium by delivering to them effective possession with CF. The condominium had been fully built and application for CF had been submitted to the relevant authorities for approval. On the other hand the interest of the petitioners here was a share with other unsecured creditors of the assets of the company upon being wound up. They had not been able to secure from the respondent any payment since the date they obtained judgment on 8 October 2004 ordering the respondent to return 80% of the sums that they had paid to the respondent (see paras 17 & 19).

(3) Having weighed the equity of both the opposing creditors and the petitioners in this petition, the balance of justice lies in favour of granting an order to wind up the respondent company in the normal course (see para 20).

[Bahasa Malaysia summary

Pempetisyen-pempetisyen memfailkan satu petisyen untuk menggulungkan syarikat responden memandangkan fakta ia tidak mampu membayar hutangnya menurut pengeluaran notis statutori di bawah s 218 Akta Syarikat 1965. Permohonan tersebut ditentang oleh responden atas alasan bahawa terdapat pemiutang-pemiutang dan pembeli-pembeli kepada unit-unit yang dibangunkan oleh responden. Terdapat 250 pembeli-pembeli dan pemiutang-pemiutang yang telah membeli keseluruhan Tower 9 dan pemaju responden sekarang pada peringkat akhir untuk memperolehi CF untuk menyerahkan milikan berkesan kepada 250 pembeli-pembeli. Satu perintah penggulungan akan menyebabkan masalah-masalah kepada pemilik-pemilik yang telah menunggu untuk mendapatkan hartanah mereka selama 10 tahun. Hanya terdapat 6 pemiutang-pemiutang yang menentang yang telah memberi notis yang kena diberi untuk menghadirkan diri di pendengaran ini. Pempetisyen-pempetisyen menghujahkan bahawa berdasarkan nombor majority pemiutang-pemiutang di Tower 9 menyokong petisyen penggulungan oleh kerana ketidakmampuan responden mendapatkan tandatangan mereka. Enam pemiutang-pemiutang yang menentang tidak membentuk majority pemiutang-pemiutang yang menentang petisyen penggulungan. Mereka hanya enam daripada lebih kurang 250 pembeli-pembeli Tower 9. Hanya sekiranya mereka hadir, mereka tidak boleh dianggap sebagai penentang. Atas isu CF, syarikat responden telahpun membuat permohonan untuk CF kepada pihak berkuasa. Responden tidak diperlukan untuk membuat apa-apa lagi. Perintah penggulungan tidak akan menjejaskan hak mereka. Sebenarnya pempetisyen-pempetisyen pula telah membatalkan perjanjian jual beli dua unit-unit tersebut dan telah berjaya menyaman dan memperolehi penghakiman terhadap responden. Dengan itu kedua-dua unit dikembalikan kepada syarikat responden.

Diputuskan, membenarkan perintah penggulungan tersebut:

(1) Soal sama ada sebuah syarikat dapat membayar hutangnya patut diputuskan

dengan melihat sama ada daripada segi perniagaan, ia adalah solven dan bukannya sama ada ia mempunyai aset-aset yang terkunci yang mencukupi untuk membayar liabiliti semasanya. Hujahan peguamcara responden bahawa anakguamnya mempunyai aset-aset yang mencukupi untuk membayar liabilitinya tidak boleh diterima oleh kerana ia adalah jelas bahawa sehingga hari ini responden tidak dapat membayar hutangnya dan dengan itu boleh digulungkan (lihat perenggan 14 & 16).

(2) Akan tetapi, s 221 Akta Syarikat 1965 memberi mahkamah budi bicara sama ada untuk menggulungkan atau tidak sesebuah syarikat dimana terdapat pemiutang-pemiutang yang membantah petisyen tersebut. Dalam petisyen ini terdapat enam pemiutang-pemiutang yang tidak bercagar yang membantah petisyen tersebut. Kepentingan mereka di syarikat tersebut ialah hanya obligasi syarikat tersebut untuk menyempurnakan penjualan unit-unit condominium mereka masing-masing dengan menyerahkan kepada mereka milikan berkesan bersama CF. Condomiunium telahpun disiapkan dan permohonan CF telahpun diserahkan kepada pihak berkuasa yang relevan untuk kelulusan. Sebaliknya kepentingan pempetisyen-pempetisyen di sini adalah untuk satu bahagian aset-aset syarikat tersebut bersama-sama dengan pemiutang-pemiutang lain yang tidak bercagar apabila syarikat tersebut digulungkan. Mereka tidak dapat sebarang bayaran daripada responden semenjak mereka memperolehi penghakiman pada 8 Oktober 2004 yang memerintahkan responden memulangkan 80% daripada jumlah-jumlah yang mereka telah bayar kepada responden (lihat perenggan 17 & 19).

(3) Setelah menimbang ekuiti kedua-dua pemiutang-pemiutang yang membantah dan pempetisyen-pempetisyen di petisyen ini, imbangan keadilan memihak kepada pemberian perintah yang biasa untuk menggulungkan syarikat responden (lihat perenggan 20).]

Notes

For cases on winding up of petition, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1321–1456.

Cases referred to

Genting Sanyen Industrial Paper Sdn Bhd v WWL Corrugators Sdn Bhd [2000] 5 MLJ 33 (refd)

United Asian Bank Bhd v Hong Huat Realty (M) Sdn Bhd [1998] 2 CLJ (Rep) 511 (refd)

Wong Thai Kuai & Anor v Kansas Corp Sdn Bhd [2007] 4 MLJ 33 (refd)

Legislation referred to

Companies Act 1965 ss 218, 221(1)

Steven Seah (Jenny Lee with him) (PY Hoh & Tai) for the first and second petitioners.

Manjit Singh (Deepinder Kaur and Paramjit Singh with him) (Manjit Singh Sachdev Mohammad Radzi & Partners) for the respondent.

T Ramalingam (Yum Shirley with him) (Yum Shirley & Co) for the opposing creditors.

Kang Hwee Gee J (delivering oral judgment (ex tempore)):

[1] This is a petition to winding up the respondent company on account of the fact that it was unable to pay its debt pursuant to the issuance of a statutory notice under s 218 of the Companies Act 1965.

[2] The application is opposed by the respondent on the following grounds:

[3] The company is able to pay its debt every sen to the ringgit. See the opposing affidavit of Abdul Wahid bin Jaafar, a director of the respondent, in para s 9 and 10 of encl 32.

[4] Notwithstanding the fact that the company is unable to pay its debt this does not mean that a winding up order would follow as a matter of course. In deciding whether a winding up order should be made the court must act in accordance with s 221(1) of the Companies Act 1965 which read as follows:

> On hearing a winding up petition the Court may dismiss it with or without costs or adjourn the hearing conditionally or make any interim or other order that it thinks fit, but the Court shall not refuse to make winding up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets or that the company has no assets or in the case of a petition by a contributory that there will be no assets available for distribution amongst the contributories.

[5] The court has a wide discretion to allow a company to continue to function despite the fact that it may not be able to pay its debt to the petitioners. There are other creditors and purchasers to the units being developed by the respondent. There were 250 purchasers cum creditors who had purchased the entire Tower 9 who are now being represented by Encik T. Ramalingam who are opposed to the company being wound up on account of the fact that the developer respondent is now in the final process of obtaining CF to hand over effective possession to the 250 purchasers. A winding-up order will cause untold problems to the owners who had been waiting to get the property for the past 10 years.

[6] Nothing will be gained by granting the winding-up order since the petitioners will become unsecured creditors and will have to share the assets of the company with other creditors.

[7] The winding up must bring benefit to the creditors. Here it would not. Even to the petitioners themselves.

[8] Balance of justice required. See *Wong Thai Kuai & Anor v Kansas Corp Sdn Bhd* [2007] 4 MLJ 33 per Ramly Ali J at p 42:

> The court has a discretionary power to wind up a company under s 218 of the Companies Act 1965. The use of the permissive word 'may' in ss 217, 218 and 221 of the Act — rather

than the mandatory 'must' or 'shall', gives the court a discretion whether or not to wind up a company, even if the Petitioners have shown that they are 'creditors' and the debt in question is not disputed.

[9] Also at p 34 Held:

(3) The court has a discretionary power to wind up a company under s 218 (see *Kam Wah Theatre Sdn Bhd v Fahlum Development Sdn Bhd* [1990] 2 MLJ 511. In considering whether or not to allow the petition filed by the petitioners, this court should consider the voice of the majority of creditors in the same class as the petitioners, that is the opposing creditors. Since the said project is 97% completed and is in its final stages, it is of public policy interest as well as the balance of justice require that the respondent should not be wound up as petitioned by the petitioners. The respondent should be given the opportunity to continue and to complete the said project until full completion since the said project is 97% completed and is in its final stage.

[10] Submission by Mr T Ramalingam representing the six opposing creditors, Dato' Abdul Rahman bin Yeop, Ng Boon Chuan @ Nicholas Ng Boon Chuan, Goh Yong Peng, Tan Cheng Ho, Wong Yew Kuan and Tee Lian Teng who had given due notice to appear in this hearing:

(i) Ramly Ali J's judgment in Wong Thai Kuai, supra, is almost on all fours with respect to the exercise of discretion of the court under Section 221 of the Companies Act 1965 where there were opposing creditors. I am of the same opinion as the counsel for the respondent on this point and adopt his submission.

(ii) The reason why they opposed this petition is because Tower 9 comprises of 250 units is yet to be given effective vacant possession although it has been fully completed and occupied without CF. They have suffered the agony of purchasing an unlawful property for the past 10 years. The receipt of the CF would constitute an affirmation of their proprietary interest in the properties that they have purchased.

[11] Reply by counsel for the petitioners:

(i) Numerically the majority of creditors in Tower 9 support this winding-up petition by virtue of the inability of the respondent to secure their signatories. The six opposing creditors do not form the majority of creditors opposing the winding up petition. They constitute but six of about 250 other purchasers of Tower 9. Unless they are here they cannot be treated as opposers.

(ii) Secondly, the issue of effective possession with CF — the opposing creditors have stated their addresses in Tower 9. Therefore they have in possession of those properties. The opposing creditors only interest and concern now is obtaining CF and this would be forthcoming in four months' time. The respondent company had already submitted an application for CF to the authorities, exh 'YS-3' where the authorities had acknowledged the application. The petitioners on the other hand had rescinded the S&P of two units and had successfully sued and obtained judgment against the respondent. Hence the units had reverted back to the respondent company. We are only

claiming monies which we have paid to the respondent in buying the condominium amounting to half a million ringgit (RM204,836.02 and RM194,573.20) without claiming any damages.

(iii) Public interest here means the interest of the opposing creditors being six in number and also the interest of the petitioners. If the winding-up order is allowed the scheme would be better protected for the very simple reason that a prospective creditor needs leave from this court to institute an action against the respondent.

(iv) The application for CF has been submitted to the authorities. This is evidenced in exh 'YS-3' in the opposing creditors' affidavit. The respondent is not required to do anything more. The winding up order will not affect their interest.

(v) The respondent has constructed this block without the necessary approval and licence from the authorities. If winding up order is not made then this would tantamount to legalising the illegal act of the respondent company.

(vi) The petitioners acted in good faith in making this petition to wind up. We had instituted an action against the respondent way back in 2001 with respect to the S&P signed in 1995. The petition for winding-up was applied for in April 2006. We had earlier applied for leave to execute against the company but it was later set aside in our absence by the court. Hence we commenced this winding- up upon obtaining leave from D2 court which issued the 176 restraining order.

[12] Reply by counsel for the respondent:

(i) The fact that the rest of the purchasers of Tower 9 had not filed any notice at all cannot be taken as they having not objecting to this petition.

(2.) We had been instructed to file an affidavit listing out the free assets of the respondent and we had done so. The respondent's free assets (fully unencumbered) consist of 2 units of condominium and a piece of land valued at RM500,000 market price.

[13] Reply by Mr T Ramalingam:

The act of the petitioners is an act of oppression considering the fact that the winding up order would deny potentially 250 legitimate purchasers of their right to effective occupation of the premises that they had bought.

FINDINGS AND DECISION

[14] The question of whether a company is able to pay its debt is to be judged on whether it is commercially solvent and not whether it has assets locked up sufficient to meet its current liabilities.

[15] See *United Asian Bank Bhd v Hong Huat Realty (M) Sdn Bhd* [1998] 2 CLJ (Rep) 511 per Shankar J as he then was at p 515:

> The particular indications of insolvency mentioned … are all instances of commercial insolvency, that is, of the company being unable to meet current demands upon it. In such a case it is unless to say that if its assets are realised there will be ample to pay 20 shillings in the pound; this is not the test. A company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realisable; but although this be so, yet if it have not assets available to meet its current liabilities, it is commercially insolvent and may be wound up.

[16] It follows that the submission of counsel for the respondent that his client had ample assets to meet its liabilities is untenable for it is clear until today the respondent is unable to pay its debt and is therefore liable to be wound up.

[17] Nevertheless, s 221 of the Companies Act 1965 gives the court the discretion whether or not to wind up a company where there are creditors who opposed the petition. The law in this respect is alluded to in *Genting Sanyen Industrial Paper Sdn Bhd v WWL Corrugators Sdn Bhd* [2000] 1 CLJ 27 at p 30 wherein Skinner J says:

> The submission that there is an overriding discretion reposed in the court is well supported by authority because whilst it is accepted that as between a creditor and a company as his debtor, the creditor who proves insolvency is prima facie entitled to a winding up order, (see the judgment of Buckley J at p 331 in *Re Crigglestone Coal Co Ltd* [1906] 2 Ch 327) there are numerous cases, both local and Commonwealth, in which the overriding discretion of the court to refuse a winding up is recognised, (see *Kim Wah Theatre Sdn Bhd v Fuhlum Development Sdn Bhd* [1990] 2 MLJ 51l; *Cetico Sdn Bhd v The Tropical Veneer Co Bhd* [1987] 1 CLJ 170; [1988] 2 MLJ 665; *Re P & J Macrae Ltd* [1961] 1 All ER 302).
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> However, as counsel for the petitioner correctly points out, the overriding discretion of the court, like any other judicial discretion, is fairly strictly regulated and is exercised in accordance with principles that are well defined. Counsel referred to *The Law of Company Liquidation* (3rd Ed) by J O'Donovan at p 61 where the author discusses the discretion of the court in these terms:
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> > Its power to refuse an order is, however, fairly strictly regulated and is exercised in accordance with principles that are relatively well defined. There are, in fact, certainly no more than five, and probably only four, reasons which will justify the court in refusing to make an order on the application of an unpaid creditor. These are (1) the applicant's debt amounts to less than $1,000; (2) the debt is bona fide disputed by the company; (3) the company has paid or tendered payment of applicant's debt; (4) winding-up is opposed by other creditors; and (5) the company is in the process of being wound up voluntarily.

[18] With regard to the opposition to winding up by the company by unsecured creditors, this is what McPherson the author of *The Law Of Company Liquidation* (1968) says at p 69:

> Where the petition is presented by one or more of a number of unsecured creditors, the court in exercising its discretion is not restricted to making an order which will give effect to the prima facie right of an unpaid creditor to have the company wound up. According to Buckley J in *Re Crigglestone Coal Co* [1906] 2 Ch 327, the right to have an order made is clearly that of a class of creditors to which the petitioner belongs, and since all the members of that class will be equally affected by the winding up, all are entitled to be consulted on the desirability of such a course.

[19] In the instant petition there are six unsecured creditors who opposed this petition. Their only interest in the company is the obligation of the company to complete the sale of their respective units of condominium by delivering to them effective possession with CF. The condominium had been fully built and application for CF had been submitted to the relevant authorities for approval. On the other hand the interest of the petitioners here is a share with other unsecured creditors of the assets of the company upon being wound up. They had not been able to secure from the respondent any payment since the date they obtained judgment on 8 October 2004 ordering the respondent to return 80% of the sums that they had paid to the respondent.

[20] Having weighed the equity of both the opposing creditors and the petitioners in this petition, the balance of justice lies in favour of granting an order to wind up the respondent company in the normal course. An order of winding up should be made against the respondent with costs. There shall be no other order with respect to the other prayers.

Winding up order granted.

Reported by Sally Kee